

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 February 2011

Public Authority: Cornwall Council
Address: County Hall
Treyew Road
Truro
Cornwall
TR1 3AY

Summary

The complainant requested information relating to a list of primary schools in Cornwall that were facing or might potentially face issues of financial sustainability. The Council refused to disclose the requested information under section 36(2)(b)(ii) and (c) of the Act. The Commissioner finds that the exemptions are engaged and that the Council acted correctly in refusing to provide the requested information. Therefore the Commissioner requires no further steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act).

Background

2. On 30 December 2009 Councillor Bain, Cabinet Member for Children, Cornwall Council published a letter in the Cornish Guardian that referred to a list of primary schools in Cornwall 'at risk' of closure. The letter acknowledged discussion of this list by the previous Liberal Democrat County Council administration but stated that no such list had been drawn up by the Council.

The Request

3. On 6 January 2010 the complainant requested the following information from Cornwall Council (the Council):

"the minutes of all internal meetings at which the Council (and/or the former Cornwall County Council as appropriate) discussed this list of primary schools 'at risk of closure' and any reports, papers and internal correspondence (including emails) relating to this issue, from January 2008 to date.

In the event that complying with my request would exceed the appropriate limit of £450, the list of the 80 specific schools would suffice".

4. On 29 January 2010 the Council responded by stating that the requested information was not held. The Council explained that a list of schools that potentially faced issues of financial sustainability had been drawn up by the Council's Children, Schools and Families Directorate (CSF); however this list had not been discussed in any formal meetings by Cornwall County Council or Cornwall Council. The Council considered that this list was not a list of schools "at risk of closure" as described by the complainant.

5. The complainant did not accept the Council's assertion that it did not hold the information he requested. Following an exchange of correspondence the complainant submitted the following revised request on 1 February 2010:

"a list of primary schools in Cornwall that were facing or might potentially face issues of financial sustainability as prepared by Children, Schools and Families".

6. On 10 February 2010 the Council responded to the complainant. The Council confirmed that it did hold information of this description, but that it was being withheld under section 36(2)(b)(ii) and section 36(2)(c) of the Act, as disclosure would prejudice the effective conduct of public affairs.
7. The complainant was dissatisfied with this response and requested an internal review of the Council's decision on 11 February 2010. The Council provided its internal review response on 4 March 2010 and the review upheld the original decision not to disclose the requested information.

The Investigation

Scope of Investigation

8. On 14 March 2010 the complainant contacted the Commissioner to complain about the Council's refusal to provide him with the requested information. The Commissioner's investigation therefore focused on the information requested on 1 February 2010, ie the list of schools that were facing or might potentially face issues of financial sustainability.

Chronology

9. On 10 September 2010 the Commissioner wrote to the Council requesting a copy of the withheld information. The Commissioner also asked for sight of any submission to the qualified person, when this occurred and the qualified person's deliberations on the application of section 36 in order that the Council could demonstrate that it was a reasonable opinion reasonably arrived at.
10. As the Council was relying upon two limbs of the section 36 exemption (section 36(2)(b)(ii) and section 36(2)(c)), the Commissioner also asked for any further arguments it had to make regarding the engagement of each subsection. The Commissioner highlighted the fact that in order to engage section 36(2)(c) some prejudice other than that protected by section 36(2)(b)(ii) must be shown.
11. On 11 October 2010 the Council responded to the Commissioner providing a copy of the requested information and further arguments in relation to its application of the exemption at section 36. The Council also provided details of the submission to the qualified person and evidence of his consideration of the application of section 36.

Analysis

Exemptions claimed

Section 36 – prejudice to the effective conduct of public affairs

12. The Council relied upon two limbs of the section 36 exemption, section 36(2)(b)(ii) and section 36(2)(c), to withhold the information. The Commissioner considers that it is acceptable to claim more than one

limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection.

13. Section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act, as the opinion of a qualified person is required to engage the exemption. Section 36(2)(b)(ii) and section 36(2)(c) provide that:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

(b) would, or would be likely to, inhibit -

...

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

The opinion of the qualified person

14. In order to establish whether the exemption is engaged, the Commissioner considers it necessary to:
- Establish that an opinion was given
 - Ascertain who the qualified person was
 - Ascertain when the opinion was given and
 - Consider whether the opinion was objectively reasonable and reasonably arrived at.
15. The Council had stated in its refusal notice that its qualified person was Richard Williams, the Monitoring Officer and Head of Legal and Democratic Services.
16. The Council confirmed to the Commissioner that its legal services department had prepared the arguments for and against disclosure of the requested information under section 36 on 3 February 2010 and referred these to the qualified person. The qualified person considered the arguments and verbally provided his opinion that the exemption was valid on 5 February 2010 to facilitate responding to the complainant. This opinion was later confirmed in writing on 11 February 2010.
17. Having inspected a copy of the qualified person's written opinion, the Commissioner is satisfied that the opinion was sought and obtained

properly. The Commissioner must therefore now consider whether the opinion could be considered to be reasonable.

18. In *Guardian and Brooke v the Information Commissioner and the BBC* (EA/2006/0011 and EA2006/0013), the Information Tribunal decided that a qualified person's opinion under section 36 is reasonable if it is both "reasonable in substance and reasonably arrived at". It elaborated that the opinion must therefore be "objectively reasonable" and based on good faith and the proper exercise of judgement, and not simply "an opinion within a range of reasonable opinions". However, it also accepted that "there may (depending on the facts) be room for conflicting opinions, both of which are reasonable".

Was the opinion reasonably arrived at?

19. The Council provided the Commissioner with a copy of the submission that had been given to the qualified person and his written response. The Council explained to the Commissioner that when it had asked for the qualified person's opinion it had provided a copy of the complainant's request for information together with arguments for and against disclosure and consideration of the public interest.
20. The Commissioner notes that that in both the refusal notice and internal review the Council endeavoured to identify precisely why the prejudice would be likely to occur and what form it would take.
21. On consideration of the submission to the qualified person the Commissioner noted evidence of relevant arguments and that the qualified person had been provided with a significant amount of detailed information such as precisely why and how inhibition would occur. Therefore the Commissioner considers that the qualified person's opinion was reasonably arrived at.

Was the opinion reasonable in substance?

22. As the Commissioner was satisfied that the opinion was reasonably arrived at, he went on to consider whether the opinion was "reasonable in substance". It is worth emphasising that this does not mean that the Commissioner has to agree that the inhibition described was "likely" to occur as this is for the qualified person to decide.
23. The Council stated that its Primary Strategy for Change (PSfC) is the response to a statutory duty for CSF to review its delivery of services to ensure the efficient and effective use of its resources. The Council advised that the review requires the disclosure of information between governing bodies and the local authority. The information provided by

the schools must be accurate and informative so that a true picture of the school's position can be ascertained for strategic resource planning purposes.

24. The Council provided the Commissioner with the detailed arguments provided to the qualified person, which the Commissioner has summarised below.

Section 36(2)(b)(ii) - the free and frank exchange of views for the purposes of deliberation.

25. The Council argued that if the schools believed that information provided by them as part of the review may be subject to public scrutiny before a strategy for addressing the issues is agreed, then it would be likely that the information they provided might not be as complete or accurate as it would have been if disclosed in confidence. The Council believed it highly likely that free and frank disclosure would be inhibited arising out of concern that the information may be taken out of context of an overall plan and made public.

Section 36(2)(c) – otherwise prejudice the effective conduct of public affairs

26. The Council expressed concerns about the immediate effect that disclosure of the requested information would have on the operation and management of the schools concerned. It was believed that, if the information were to be disclosed, the schools listed would be very likely to receive a high number of enquiries from parents and the press which would cause considerable disruption for schools trying to deliver day to day education provision.
27. The Council highlighted a previous occasion when the inadvertent disclosure of a similar list had the effect of causing a great deal of media coverage, both in the papers and on local news and television. The Council noted that it was still handling queries on the list more than a year after its accidental publication.
28. The Council was of the view that there was a real probability that this would occur as it was the stated intention of the complainant to take the list to the press and other media. The Council perceived that the complainant believed that the schools identified were 'at risk of closure'.
29. The Council was also concerned about the significant damaging effect on the schools concerned as the reaction of parents to the perceived risk of closure of the schools would be likely to further undermine the

ability of those schools to address issues of future sustainability. The process for school allocation enables a certain amount of choice, and where schools were portrayed as at risk of closure the Council believed that parents would opt for alternative schools not considered to be at risk of closure.

30. The Council stated that previous experience had indicated that a school identified as carrying issues of future viability (whether the message is packaged as at risk of closure or otherwise) will be much less likely to be selected by families as their school of choice. In view of this the allegation that it is a list of schools at risk of closure could become a self-fulfilling prophecy.
31. The Council also argued that the release of the list would suggest that the schools mentioned had major challenges to be overcome. The Council regarded this information to be commercially sensitive to the Board of Governors of each school, and that it had been provided to CSF for planning purposes only. However, the Commissioner does not consider this argument to be relevant to the exemption at section 36(2)(c), as the relevant exemption for commercial interests is that at section 43(2) of the Act, which was not claimed by the School.

Prejudice to the development of the PSfC

32. The Council argued that the release of the list of schools could undermine the consultation process such that individuals would be less likely to engage effectively with the consultation process to the detriment of the Primary Strategy's development. The Council expressed concern that, instead of participating in the broader consultation process, parents would be likely to lobby members on specific schools. This in turn would make it more difficult to take a strategic view on the county as a whole.

Damage to CSF/School relationship

33. The Council believed that schools would lose confidence in CSF as a directorate because they provided information to CSF with an expectation of confidentiality. The Council was unsure whether disclosure would be an actionable breach of confidence but considered that it would be likely to damage the partnership basis on which the Council works with these schools and erode trust and confidence between the affected schools.
34. The Commissioner notes that the qualified person identified the likelihood of the inhibition in the case of section 36(2)(b)(ii) occurring as one that meets the higher test of 'would inhibit'. In the case of

section 36(2)(c), the Commissioner notes the Council's submission identifies that it considers the likelihood of the prejudice occurring as one that could prejudice or as the Act states 'would be likely to occur'.

35. The Commissioner has carefully considered the arguments put forward by the Council in relation to the exemption at section 36(2)(b)(ii) and section 36(2)(c). The Commissioner notes that the Council included an argument which is not relevant to section 36(2)(c) (that relating to commercial interests). However, on balance the Commissioner is of the view that the correct process was followed in obtaining the opinion, that the opinion was objectively reasonable and was reasonably arrived at. The Commissioner is therefore satisfied that the Council correctly applied these exemptions to the requested information, therefore the Commissioner has gone on to consider the public interest.

Public interest test

36. Under section 2(2) of the Act, exempt information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has considered public interest arguments in relation to section 36(2)(b)(ii) and section 36(2)(c) separately.
37. As noted in the case of *McIntyre v Information Commissioner and the MOD* (EA/2007/0068), the reasonable opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice may occur and 'does not necessarily imply any particular views as to the severity or extent of such inhibition or prejudice, or the frequency with which it may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. The Commissioner understands this to mean that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the nature, severity, extent and frequency of prejudice or inhibition.
38. In the case of *Guardian Newspaper Limited and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013)¹ the Tribunal set out some useful general principles with regard to the public interest test under section 36:
- (a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.

(b) Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.

(c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.

(d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views for the purposes of deliberation.

(e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

Section 36(2)(b)(ii) - public interest arguments in favour of disclosing the requested information

39. The complainant argued that parents and communities would not tolerate their schools being made into 'political footballs' and that disclosure of the information would allow a more informed debate of the issues under consideration. For this reason he asserted that the requested information had been unreasonably withheld and that the qualified person had exceeded his authority.
40. The Council acknowledged that there was a general public interest in releasing information that would contribute to openness and transparency in decision making in relation to local schools. There was also a public interest in the understanding and scrutiny of how the public authorities manage their resources.

41. The Commissioner notes that disclosure of the list would identify schools that were believed at the time of the request to have sustainability concerns. As the issue was “live” at the time of the request, it could be argued that disclosure of the information could assist individuals in participating effectively in the consultation process.

Section 36(2)(b)(ii) - Public interest arguments in favour of maintaining the exemption

42. The Council stated that the requested information was just one step in the process of resource planning (undertaken in response to a statutory function) and was not a final decision that represented the Council’s current thinking. The review of resources involved many stages of information gathering and analysis, which were subject to further changes, interim action plans etc that would influence whether schools continue to have issues of sustainability.
43. The Council argued that the public interest would not be served by undermining the process of obtaining information from the schools, as argued above. The Commissioner understands the Council’s argument to be that schools needed assurance that the information they provided would be protected from unnecessary and unhelpful public comment. The Council was concerned that no differentiation is made by the public between schools carrying issues of future viability and those at risk of closure.

Balance of the public interest in relation to section 36(2)(b)(ii)

44. In considering where the balance of the public interest lies, the Commissioner notes that the arguments for non-disclosure outlined above rely on the Council’s assertion that disclosure would inhibit schools providing information regarding viability/sustainability issues in the future. The Commissioner is not generally of the view that disclosure of information on one occasion would necessarily inhibit future discussions but rather that this must be considered on a case by case basis.
45. Having reviewed the withheld information and noted the arguments submitted, the Commissioner is mindful that on a previous occasion the inadvertent disclosure of similar information did cause negative media coverage for the schools involved. He is therefore minded to accept that disclosure of the requested information in this case would have a similar effect. The Commissioner considers that there is a strong public interest in ensuring that schools were willing and able to provide relevant information to the Council, and failure to do this would make it more difficult for the Council to seek and obtain the

information it needed. This in turn would have a detrimental impact on the Council's planning processes.

46. The Commissioner appreciates that school provision is a key issue for the public, and acknowledges that disclosure could provide the public with information on an issue that affects education provision in the area and this matter would indeed be the subject of local interest and debate. However the Commissioner considers that there is a stronger need for information to be shared in a free and frank way to enable the Council to develop its thinking and explore options and their implications.
47. The Commissioner therefore concludes that the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighs the public interest in disclosing the information.

Section 36(2)(c) - Public interest arguments in favour of disclosing the requested information

48. As with its arguments in relation to section 36(2)(b)(ii), the Council considered that there was a general public interest in releasing information about issues with local schools and demonstrating transparency of decision making in relation to any changes to their organisation, enabling interested parties to contribute to public debate.

Public interest arguments in favour of maintaining the exemption

49. The Council argued that the public interest is served in this situation by the continuance of the process for developing the Primary Strategy and not by the disclosure of a list that does not add any degree of understanding or transparency to this process.
50. The Council also maintained that it would also not be in the public interest to jeopardise the partnership type relations between the CSF and its schools and the allocation process currently being undertaken, which would be significantly undermined by disclosure of the information.
51. Finally the Council argued that the public interest is not served by the disruption to the delivery of education services, which was likely to occur both in the immediate period following release of the list and in the longer term through the disruption of the process of developing the primary strategy.

Balance of the public interest arguments

52. As with section 36(2)(b)(ii), the Commissioner acknowledges that disclosure of the information would inform the public generally about education provision in Cornwall.
53. However the Commissioner accepts that the opinion of the qualified person was reasonable and is persuaded by his conclusion that disclosure of the requested information would be likely to have a significant impact on the review process in terms of the diversion of resources to manage the impact of the disclosure. The Commissioner acknowledges that disclosure of the information would be likely to lead to a loss of confidence in schools, simply by virtue of their inclusion on this list, and considers that there is a strong public interest in protecting them from this negative effect.
54. On balance the Commissioner concludes that disclosure would be likely to have a significant impact on the conduct of public affairs and that the public interest in maintaining the exemption under section 36(2)(c) outweighs the public interest in disclosing the information.

The Decision

55. The Commissioner's decision is that the Council dealt with the request for information in accordance with the Act.

Steps Required

56. The Commissioner requires no steps to be taken.

Right of Appeal

57. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31, Waterloo Way
LEICESTER
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 16th day of February 2011

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 36 – Prejudice to the effective conduct of public affairs

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.